

IN THE RESIDENT MAGISTRATES COURT
AT SUVA- CRIMINAL JURISDICTION

Criminal File No: MACD 55/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : Tarterani Rigamoto

1st Accused

Sainimeli Tivao

2nd Accused

Penamino Tavo

3rd Accused

Appearances

For the State : Mr. J. Work (FICAC)

For the 1st Accused : Mr.M. Fesaitu (LAC)

For the 2nd Accused : Ms.Filipe (LAC)

For the 3rd Accused : Dealt With

Date of Ruling : 29th November 2021

RULING

1. This is a matter where the recording of evidence in terms of the trial was split between before the Chief Magistrate Usaia Ratuville and Resident Magistrate Lasitha Chaminda.
2. The former began proceedings, whilst the latter took over until the completion of the trial.
3. Whilst awaiting Judgment the *High Court Amendment Act 2021* was enacted and came into force via Gazette on 12th February 2021.
4. Consequentially, the *High Court Amendment Act 2021* introduced the Anti-Corruption Division of the Magistrates Court, wherein via Section 61M all

pending proceedings were to be transferred to the Magistrate Court responsible for the Division.

5. As a result Resident Magistrate Chaminda whom had carriage of the matter at the material time, seized to have jurisdiction over this matter pursuant to Section 61M of the **High Court Amendment Act 2021**.
6. Following on from the same, Section 61M (2) the **High Court Amendment Act 2021** bestows upon this court the discretion to consider Section 139 of the **Criminal Procedure Act 2009**, upon the transfer of proceedings.
7. When this matter was called on 19th November 2021 the court enquired of the parties on the same.
8. Prosecution opted that the incumbent court, continue on from where the former judicial officer left off, whilst learned counsels for the two remaining accused persons opted for a trial de-novo.
9. The right to have a trial de-novo is provided for in section 139 of the **Criminal Procedure Act 2009** which reads:

"139 – (1) Subject to sub-sections (1) and (2), whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeededby another Magistrate, the second Magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by second magistrate, or the second magistrate may re-summon the witnesses and recommence the proceeding or trial.

(2) In any such trial the accused person may, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned or reheard and shall be informed of such right by the second magistrate when he or she commences the proceedings.

(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of the opinion that the accused has been materially prejudiced, and may order a new trial. "

10. **Goundar J.** elucidated this consideration in **Jale Baba** HAC 135.2010 as follows:

"The learned Magistrate has discretion to either proceed with the case on the record of the previous Magistrate, or de novo. This discretion must be exercised after weighting (sic) all the relevant factors such as sufficiency of earlier court record and whether the accused is disadvantaged by the fact that the new magistrate had no opportunity to observe the demeanour of the prosecution witnesses when they gave evidence. Of course, no exhaustive list can be produced. The right to a fair trial is the ultimate objective."

11. The consideration by Goundar.J has been adopted in *Baba v State* [2015] FJHC 156; HAA040.2013 (6 March 2015) and later in *Khan v State* [2016] FJHC 226; HAA44.2015 (7 April 2016).

12. *Madigan J* (as he then was) in *Baba v State* (supra) adjudged that the right under Section 139 of the *Criminal Procedure Act 2009* was all encompassing and he stated it in this manner:

“28. It would appear then that on a reading of s.139 in its entirety, an application for a *trial de novo* in the Magistrates Court can never be refused.”

13. However, *Aluthge J* in *Khan v State* (supra) alluded to the following consideration that is:

“30. If *trial de novo* is ordered, Prosecution will be placed at a disadvantage of having to call the witnesses again after a passage of nearly four years. Some witnesses may be missing or, even if they are available, their memory may have been faded away. It would be unfair to put the victim and witnesses of Prosecution through the ordeal again of giving evidence. The right to a fair trial is the ultimate objective. Fairness is not only for the accused but for everybody involved in the trial process.”

14. This court now has carriage of the matter and from the transcript available it notes that the trial had intermittently progressed beginning on 21st January 2019 to 22nd January 2019. This was conducted before the Chief Magistrate and he had recorded the evidence of three (3) Prosecution witnesses.

15. Thereafter the trial was continued on the 20th, 21st and 22nd of January 2020 where Resident Magistrate Lasitha Chaminda had taken over the proceedings and heard the evidence of all the remaining prosecution witnesses.

16. Upon the close of Prosecution case there was an application for ‘No Case to Answer’ by all three (3) accused.

17. The matter was recalled on 2nd June 2020 wherein Resident Magistrate Lasitha Chaminda gave a ruling in terms of ‘*No Case to Answer*’. In his decision, he ruled that the 1st and 2nd accused had a case to answer, however the 3rd accused did not (resulting in his acquittal).

18. The remaining accused persons proceeded with and as such the trial was continued on 6th July 2020 wherein it also was completed.

19. Arising out of the trial twenty (20) exhibits were tendered of which three (3) relate only to caution interview's whilst the rest were financial documents as well as minutes of meetings.
20. Consequentially as it appears to the incumbent court from perusing the trial transcript and the exhibits, that the question which this court will have to ascertain in terms of being satisfied of the legal burden is not so much on the demeanour of witnesses but rather documentary evidence which has been tendered.
21. In the light of the above mentioned discussions this court is satisfied that the material before it is sufficient for the court to form an opinion of guilt or otherwise. Considering *Khan v State (supra)*, this court accepts that not only Prosecution but also Defence shall bear the financial cost and the uncertainty that shall exist in terms of the memories of possible witnesses, if a trial de-novo were to be ordered.
22. Another important consideration is that the 3rd accused has been dealt with legally and his opinion has not been sought (and does not need to be sought) because he has been acquitted. The obvious question, that arises is if this court were to order a trial de-novo, is simply that this shall have an impact on an acquittal already adjudicated upon.
23. There is no appellate powers conferred in terms of this matter to this court and any decision in favour of de-novo shall have an impact on an acquittal which has been properly administered.
24. In the circumstances given that the material before the court is sufficient and also being abreast of the fact that there is a possibility of this court considering matters which are beyond its powers as a court of first instance (should a trial de-novo be ordered), the ordering of a trial de-novo would not be in the interests of justice.
25. As a result, there shall be no trial de-novo.
26. The court so orders.